Supreme Court, U.S.
FILED
06-804 DEC 11 2006
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No.

IN THE

# Supreme Court of the United States

GUY CAMAN, AN INDIVIDUAL, PETITIONERS

*v.*

CONTINENTAL AIRLINES, INC.

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

This case presents an issue of international importance for protection of air travelers, including United States citizens traveling abroad, not addressed by this Court in *Olympic Airways v. Husain*, 124 S. Ct. 1221, 1229 (2004):

> Does an international carrier's failure to adequately warn its passengers of a risk of death or serious bodily injury associated with certain conditions of air travel, a risk known to the airline but not its passengers, constitute an "accident" within the meaning of Article 17 of the Warsaw Convention.

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## OPINIONS BELOW

Petitioner seeks review of the opinion rendered herein by the United States Court of Appeals for the Ninth Circuit which is reported as 455 F.3d 1087 and is the Ninth Circuit No. 03-56810. A copy of the Memorandum is reproduced in the Appendix as, (1a-9a)[1]. The order of the United States District Court for the Central District of California is unreported. A copy of the document is reproduced in the Appendix as, (10a-14a).

## JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was filed on March 1, 2006. The jurisdiction of this Court is invoked pursuant to 28 *U.S.C.* § 1254(1).

## RELEVANT PROVISIONS INVOLVED

The Convention for the Unification of Certain Rules Relating to International Transport by Air, Oct. 12, 1929, 49 Stat., part II, p. 3000, TS No. 876 (1934), reprinted in 49 U.S.C. § 40105 (1997) ("The Warsaw Convention or Act")[2]

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[1]Citations to the Appendix to the Petition as _a.

[2]The Warsaw Convention has been amended by the Agreement Relating to the Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB 18900, approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302 (1966), Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955, signed at Montreal on 25 September 1975, ratified by the United States 1998 reprinted in S. Exec. Rep. No. 105-20 (1998). These amendments do not affect Article 17.

Article 17 or the Warsaw Act states:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 24(1) of the Warsaw Act states:

> In the cases covered by articles 18 and 19 any action for damages, however unfounded, can only be brought subject to the conditions and limits set out in this Convention.

Article 24(2) of the Warsaw Act states:

> In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

## STATEMENT

During the course of a Continental Airlines flight that departed May 28, 2002 from Los Angeles, California, bound for Paris, France, Petitioner, GUY CAMAN, developed extensive deep vein thrombosis ("DVT").[3] As a result, the Petitioner required

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[3]Deep Vein Thrombosis (DVT) and its associated condition, venous thromboembolism are extraordinarily dangerous conditions

hospitalization immediately upon his arrival at Charles De Gaulle Airport, in Paris.

At no time before May 28, 2002, had the Petitioner ever heard of DVT being associated with long duration air flight. Neither did he know prior to his flight that conditions in the aircraft could cause this life threatening medical condition. At no time prior to, or during the flight did Respondent, CONTINENTAL AIRLINES, INC., advise him, orally or in writing, about the risk of DVT created by long duration flight. At no time prior to, or during the flight did the Respondent inform the Petitioner of reasonable steps that he could have taken to avoid the DVT risk.

Long before this flight, air carriers knew that international air travelers were especially susceptible to the risk of DVT. Since 1954, reports in the medical literature have linked air travel with DVT and pulmonary embolism. Medical studies have found an increased incidence of DVT among passengers who have recently flown, perhaps in as many as 1 in 10. Conditions contributing toward the increased susceptibility to DVT include: immobility in flight, decreased air pressure, relative hypoxia in the flight

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associated with high morbidity and mortality. In fact, the World Health Organization considers the risk of DVT associated with long duration air travel, to be so significant that it has commissioned an international study of that health hazard and how to reduce the risk. (*See also*, T.N. Bettes, M.D. and D.K. McKenna, M.D. Medical-Advice for Commercial Air travelers, *American Family Physician*, Vol. 60, pp. 801-10 (September, 1999); Medical Advice for Airline Passengers, *Aerospace Medical Assoc.*, at Page 11 (May, 2002); R.S. Hughes, M.D., et al., Frequency of Venous Thromboembolism in Low to Moderate Risk Long Distance Air Travelers, the *New Zealand Air Travelers Thrombosis Study*, The Lancet, Vol. 362, pp. 2039-44 (January, 2003).

cabin, and dehydration.

The danger of developing DVT during long duration flights was also long known by the International Air Transport Association ("IATA"), which is the international commercial aviation industry's trade organization of approximately 275 members, including the Respondent. In 1986, IATA recommended that its members give warnings to passengers about the risk of DVT. A manual distributed by the IATA to its members mentioned that "prolonged immobilization on long flights has a noticeable effect on the circulation, especially in the lower limbs." Because "the opportunity for physical exercise is very limited," since aircraft "aisles will be blocked most of the time by cabin personnel serving passengers," IATA recommends that its members encourage their passengers to "take every opportunity to exercise" especially "during intermediate stops." IATA's 1986 recommendations, however, went even further: "During flight, passengers should be encouraged to move their feet frequently and exercise the muscles of the legs. when possible, to minimize ankle and feet swelling, the passengers should stand and walk the aisles for a few minutes every hour or so and to elevate the feet as high as possible while sitting."

In 2001, IATA instructed its member carriers to inform travelers of the risks of DVT when a reservation is booked. IATA also again encouraged carriers to remind passengers - just before boarding and while on board - to drink sufficient fluids, wear loose-fitting clothes, avoid smoking and alcoholic beverages, and perform physical exercises in their seats (particularly for their feet and legs).

Prior to the subject flight a number of international carriers had followed IATA's directions

and recommended a series of leg exercises that could be done by passengers in flight to help avoid developing DVT. Continental, on the other hand, has chosen not to mention DVT risk and prevention to its passengers, not even in a small note at the back of its in-flight magazine. Thus, the Petitioner did not receive the IATA recommended warning. He was ignorant of prophylactic and ameliorating measures to prevent DVT, and, as a result, suffered a disabling, life-threatening medical event during the course of his flight.

Petitioner brought suit in Federal District Court seeking relief under Article 17 of the Warsaw Act. The District Court entered judgment in favor of Respondent, ruling as a matter of law that DVT could not be considered an "accident" under Article 17. The District Court purported to rely upon a definition of "accident" under Article 17, that it incorrectly believed was adopted by this Court in the 1985 opinion of *Air France v. Saks*, (1985) 470 U.S. 392, 404. The Ninth Circuit affirmed, and a Petition for Rehearing was denied.

Although left undefined in the Warsaw Act as drafted in 1929, this Court has consistently opined that the purpose and intent underlying the Act required that a compensable "accident" be an "unexpected or unusual event or happening that is external to the passenger." *Id.* This Court, in *Olympic Airways v. Husain*, (2004) 124 S.Ct. 1221, recognized that where an international carrier's failure to act on information in its possession causes injury to a passenger, the Warsaw Act will afford relief. The issue there concerned whether an omission could satisfy the requirements of an "unexpected" or "unusual" event or happening. This Court found absolutely no distinction under Article 17

between carrier *acts* and *omissions*, if passenger injury results.

The District Court erroneously analogized Petitioner's disabling injury to that addressed by this Court in *Saks*, because the Continental flight took off, flew, and landed as planned. Under this faulty paradigm, if a passenger suffers an injury causally related to the carrier's operations on an otherwise "normal" international flight, an "accident" may only be found if that passenger informed the crew member of a health concern before he or she is stricken, and only if the crew member's response to that information violates a "clear" industry standard of policy. This requirement is circular and self-defeating, as it requires the passenger to already know that by taking the flight he or she is exposed to a potentially fatal risk. The only way for the Petitioner to know of the risk is for Continental to tell him.

The Ninth Circuit Appeals Panel, meanwhile, decided that because the Petitioner did not inform the airline crew that he, like thousands of other international passengers each year, was susceptible, during a lengthy international flight, to developing a life-threatening medical condition, the carrier's failure to inform him about that risk was not a compensable under Article 17, because a failure to warn was an "omission" rather than an affirmative act. The act in question was a conscious decision on the part of Continental not to implement a policy to warn passengers of DVT risk.

The Panel so held, notwithstanding that: (1) in-flight DVT is not a hazard of which the traveling public, including the Appellant, is generally aware, (2) since 2001,IATA has directed its members to give passengers warnings of the DVT risk, (3) since 1996 the Air Space

Medical Association, participated in by Continental's medical director, published its guidelines describing how carriers should address the DVT risks to international airline passengers, and (4) Continental not only ignored these directives, but it also consciously decided not to disclose this information about this risk to its passengers.

The record is entirely distinguishable from the facts in *Saks*. In *Saks*, the airline had no prior knowledge or reason to suspect the particular, undisclosed idiosyncratic need of a single passenger. Accordingly, it was not "unusual" or "unexpected" that a carrier did not act upon information it neither had or had reason to anticipate. In this case, the international air carrier industry knew of the hazard to all of its passengers and advised Continental of the danger. However, Continental deliberately decided to withhold information concerning that hazard.

This Court in *Husain* rejected a conclusion that an inaction could not fulfill the *Saks* requirement for an "unusual" or an "unexpected" event. *Olympic Airways v. Husain*, 540 U.S. at 656 (2004). The Warsaw Convention does not distinguish between action and inaction, when determining Article 17 liability. *Id.* The discussion in *Husain* addressed a record that presumed the existence and breach of an "industry standard and airline policy." The result would be the same where, as here, the carrier is indisputably aware of the risk to which thousands of its passengers are exposed to annually, but fails to implement a responsive policy. This must objectively be considered "unexpected" or "unusual" since Continental had specific information from its industry, but decided not to act.

Hence, the Panel incorrectly and without reason defined inaction as having two distinct categories:

"omission," which would not trigger liability, and "commission," which does. Then, the Panel proceeded to classify Continental's failure to warn of the DVT risk, as an "omission," despite Continental having received industry directives for international air carriers to give such warnings to their passengers. On the contrary, Continental's failure to adhere to this prescribed industry standard is an affirmative decision not to follow industry standards. This Court already determined that such carrier decisions can result in a compensable "accident" under the *Saks* criteria. *Olympic Airways v. Husain, supra,* 540 U.S. 644.

The development of DVT due to a passenger's ignorance of this risk, a risk well known to the international air carrier industry, cannot, therefore, be so easily dismissed as a purely idiosyncratic reaction to normal flight conditions. Carriers are well aware that approximately ten percent of international air passengers succumb to this risk every year. This is not the same as the idiosyncratic risk discussed in *Saks* purely because of the large number of air passengers exposed.

Contrary to the Panel's conclusion, this Court explicitly held in *Husain* that a violation of a recognized industry standard fulfills the *Saks* requirement for an "accident" within the meaning of Article 17. The IATA directive is an industry standard that requires DVT risk warnings be given to international air passengers. The Panel failed to consider or analyze the importance of both the IATA directive and the Air Space Medical Association's recommendation in its analysis. The Panel also failed to follow it's own holding in *Rodriguez v. Ansett Australia*, 383. F.3d 914 (9th Cir. 2004), that liability for an "accident" may be found when there is evidence of a

violation of an industry standard to give DVT risk warnings to airline passengers. *Id.* at 919.

Instead, the Ninth Circuit Panel incorrectly pointed to the act/omission analysis that has been disapproved by this Court in *Husain.* It also pointed out a lack of a Federal regulations being determinative on whether the failure to warn fit within the parameters of an Article 17 "accident." Despite the FAA's failure to address this issue, the Panel ignores the well settled law that Congress did not preempt the entire field of aviation safety when it promulgated the Federal Aviation Regulations. *Charas v. Transworld Airlines*, 160 F.3d 1259, 1262 (9th Cir. 1998); *Sky Sign International, Inc. v. City and County of Honolulu*, 276 F.3d 1109, 1116-1117 (9th Cir. 2002).

Thus, the Panel fails to address the issue squarely presented to it in this case that it recognizes has yet to be addressed: whether a carrier's institutional failure to establish a standard to warn of a health risk it was knowingly exposing its passengers to, despite an industry trade group's directive to do so is from the standpoint of international passengers "unexpected" or "unusual".

The record provided substantial unrebutted evidence establishing a connection between the Petitioner's injury and Respondent's operation. The Ninth Circuit failed to view the evidence in light most favorable to the Petitioner, and could not weigh the parties' evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 245 (1986). The case should be submitted to the trier of fact for resolution.

## REASONS FOR GRANTING THE PETITION

### I. IT IS IMPORTANT FOR THIS COURT TO DETERMINE THAT THE AIR CARRIER'S FAILURE TO FOLLOW IATA'S STANDARD AND AIR SPACE MEDICAL ASSOCIATION'S RECOMMENDATIONS TO INFORM PASSENGERS OF A SERIOUS HEALTH RISK ASSOCIATED WITH CONDITIONS OF AIR TRAVEL, A RISK KNOWN TO THE CARRIER BUT NOT PASSENGERS, IS AN UNEXPECTED OR UNUSUAL EVENT AS DEFINED BY *SAKS* UNDER ARTICLE 17 SO AS TO IMPROVE AIR CARRIER OPERATIONS AND PROTECT INTERNATIONAL PASSENGERS FROM THE HEALTH CONSEQUENCES OF CARRIER DECISIONS.

This Petition concerns an issue both of national and international significance regarding the application and scope of the term "accident" as used in the Warsaw Act, and directly questions whether the Act will continue to provide meaningful protection for the international air traveling public.

The question raised has global significance because the opinion of the Ninth Circuit potentially jeopardizes the safety of all passengers on international flights that fly from or arrive in the United States. The Ninth Circuit opinion undercuts the well-recognized fundamental purpose of the Act, to encourage safe flying environments on international flights, and to provide international passengers with compensation where a carrier's operations led to a passenger's injury. The purpose of the Act was not only to foster the

development of, at the time, fledgling airline industry by achieving uniformity of rules governing claims, but also to balance the interests of injured passengers in receiving prompt recovery for personal injuries with the interest of carriers seeking to limit potential liability. *See, Generally*, Richard Gardner, "The Warsaw Convention at Three Score Years and Ten," 24 *Air and Space*, L. 114 (1999); *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 169-170 (1999). The Ninth Circuit decision gives a Federal Court imprimatur to an industry decision to withhold vital health and safety information from passengers, compounded by that industry's refusal to affirmatively act on a hazard about which most international passengers are ignorant.

Now, commercial aviation is an established industry and the countervailing balance of the international passenger's needs has changed. "Protection of the passenger ranks high among the goals which the Warsaw signatories now look to the Convention to serve." *Wallace v. Korean Airlines*, 214 F.3d 293, 296-297 (2d Cir. 2000). The Warsaw Act promotes passenger safety by ensuring that air carriers remain responsible for maintaining safe operations to benefit the welfare of their passengers. It is internationally recognized that airlines should have incentives to promote the safety and security of their passengers. *Maxwell v. Aer Lingus Ltd.*, 122 F.Supp.2d 210, 214 (D.Mass 2000); *Salerno v. Pan Am World Airways, Inc.*, 606 F.Supp. 656 (S.D.N.Y. 1985).

The subsequent amendments to the Act, embodied in the Montreal Accords, resulted in the signatory carriers consenting to a liability system under which they assumed "virtual strict liability" for death or injury to passengers. These amendments were made, in part, at the behest of the United States,

aiming to assure our citizens of adequate protection in the event they sustain injury on an international flight. *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 34-37 (2d Cir. 1975).

The United States, dissatisfied with the old liability limits, invoked Article 39 of the Convention and filed a notice of its intent to denounce the Act of 1965. Senator Robert F. Kennedy cogently articulated the concerns of the United States underlying its planned denouncement: "Over two million Americans travel annually on international flights. Assuring that their families are adequately protected in case of accident is, consequently, a matter of wide-spread importance...no one questions the fact that the protection now afforded to international travelers is woefully inadequate." *Id.* At the conference in Montreal, in February 1966, one day before the United States denunciation was to become effective, a compromise was brokered. Within the compromise was an agreement on the part of the carriers to waive the "all necessary measures" defense. *Id.* As a result, the Act is now seen as affording protection for all passengers from hazards of air travel, spreading the cost of that protection among them. *Id.* at 36-37. By waiving the defense of due care, liability under the Act had become considered strict under modern tort theories, although not totally absolute. *Fulop v. Malev Hungarian Airlines*, 175 F.Supp.2d 651 (S.D.N.Y. 2001).

Thus, the passenger protection purpose of the Act, and the public policy considerations it serves, form an integral part of the analysis regarding the proper scope and application of the Act. An evaluation that ignores these subsequent developments of the Act would revert the Act to its 1929 incarnation, at the

infancy of air travel, and ignore new dangers posed to air travelers fostered by technological changes in the industry over the intervening 77 years. Today, millions of people annually experience commercial air travel at altitudes exceeding 30,000 feet for periods longer than 16 hours. The risks of aviation have changed dramatically in ways unforeseeable in 1929 by the Warsaw Convention delegates. Nonetheless, the original drafters intended to create and created a system of liability and compensation rules to cover all hazards of air travel. *Day v. Trans World Airlines, supra*, 528 F.2d at 38.

The Ninth Circuit Panel erroneously decided that the DVT suffered by Caman did not result from an "unexpected or unusual event." The Panel decided that Continental's failure to warn was not an "event" as defined in *Saks* and *Husain*. If a passenger falls victim to a medical condition on an international flight, an "accident" will be found where a crew member or the air carrier acted in an affirmative way to cause the injury, or had stood by with knowledge that the injury will occur. *Olympic Airways v. Husain, supra*, 540 U.S. at 655. Strangely, the Panel did not address whether Continental's failure to follow an industry standard during an international flight, that results in injury, is "unexpected" or "unusual." The Petitioner, like many other passengers, was unaware of DVT risk before boarding the Continental flight. Due to Continental's affirmative decision not to follow prevailing directions, Petitioner could not learn of the risk of DVT, and how to avoid it.

The Panel ignores the holding in *Rodriguez*, which found significance in the absence of evidence in that record that an industry standard existed at the time requiring that international passengers be given

DVT warnings. The record here is distinguishable from the facts in *Rodriguez*. In the present case, the airline not only had prior knowledge that its flight conditions led to the suffering of DVT by its passengers, but was advised to issue warnings to international passengers of the dangers of DVT prior to the flight by IATA and by the Air Space Medical Association. Accordingly, in *Rodriguez*, the court could not address whether it was "unusual" or "unexpected" for a carrier to not issue a warning to its passengers, when the industry standard was to do so. The Ninth Circuit in *Rodriguez* was not presented with evidence that the carrier failed to comply "with industry practice at the time." *Rodriguez v. Ansett Australia, Ltd., supra*, 383 F.3d at 919.

Continental knew of the risk of DVT that all of its passengers faced. Continental received further direction from its own trade association, and the association of the air carriers' medical directors, that all international passengers should be warned of the DVT risk associated with conditions of long duration air travel. Yet, despite having this information and being aware of the directives, Continental nonetheless, affirmatively and unexpectedly declined to warn its fare paying passengers about this risk. Accordingly, the record presented establishes that an affirmative failure, indeed a refusal, to follow this standard was unusual among other international air carriers, as the common practice at the time was to issue DVT warnings to passengers on international flights.

Reliance by the Ninth Circuit Panel on *Blansett v. Continental Airlines*, 379 F.3d 177 (5th Cir. 2004), further indicates the inaccuracy of its holding herein. *Blansett*, and the Panel each ignore evidence of Continental's violation of industry standards, merely because the FAA did not require DVT warnings to be

given to passengers. The reliance upon a lack of Federal Regulations regarding DVT warnings as the *sine quo non* for the interpretation of international air travel compensation standards is faulty. The Warsaw Convention was designed to unify the rules of international air travel, not rely on each signatory's individual domestic regulations. Courts must be wary of attributing to the FAA authority to determine compensation under the Act.

Further, determination of standards by silence was rejected by the United States Supreme Court. *Olympic Airways v. Husain, supra*, 540 U.S. at 656. The Court used an example of a passenger who collapsed and stopped breathing, but his failing to advise the airline that he needed help does not preclude the airline from refusing to give aid, despite the fact that no such Federal regulation exists. *Id.* FAA regulations are not all-inclusive, and are not meant to be. If a danger to passenger's health exists, and the air carrier but not the passengers know about it, the air carrier should disclose that danger, especially when a standard exists among the international air carrier industry to do so.

As previously examined by this Court, Federal Aviation Regulations do not preempt the entire field of aviation safety. *Charas v. Transworld Airlines, Inc., supra*, 160 F.3d at 1265. On the contrary, the FAA only promulgates minimum standards. Thus, state regulation also plays a role in air safety. See, *Geier v. American Honda Motor Co.*, 529 U.S. 861, 868 (2000). By the same logic, should the international air carrier industry decide to self regulate and impose stricter standards than the mere minimum, it is free to do so. Thus, the IATA's decision to mandate that DVT warnings be given to international air passengers

should be enforced as a clear industry standard. A passenger expects that an air carrier will follow safety directives promulgated by the industry trade association, and failure of Continental to do so here was "unexpected" and "unusual."

To find the standards of international air travel it would be more appropriate to look at an international organization's directive. IATA, as the trade organization for international air carriers, better understands the realities of international air travel, and as such is best capable of setting forth appropriate warning to be given to international air passengers. The court should look to the international air travel standards to determine that a failure to follow the standards was an "unexpected" or "unusual" departure, and thus an Article 17 accident.

This Court should take the opportunity to reinforce the protective aspects of the Warsaw Act by holding carriers responsible under Article 17, when it is shown that their decision to withhold information from the traveling public was contrary to industry guidelines and resulted in a passenger suffering a serious bodily injury.

## II. THE RESPONDENT'S FAILURE TO FOLLOW IATA'S DIRECTIVE OF WARNING ITS PASSENGERS ABOUT DVT RISK RESULTING FROM CONDITIONS ON BOARD AN INTERNATIONAL FLIGHT IS A CONDITION EXTERNAL TO THE CONTROL OF THE PASSENGER, AND RESULTED IN THE PASSENGER SUFFERING DVT

This Court has interpreted "cause" to be expansively construed, requiring only some link in the injury producing "unusual" or "unexpected" event external to the passenger. *Saks, supra,* 470 U.S. at 406; *Maxwell v. Aer Lingus,* 122 F.Supp.2d 210, 211, n.2 (D.Mass. 2000).

The Petitioner was unaware of the risk of DVT on the Continental flight. As a result, he suffered DVT. "All injury is the product of a chain of causes" and the passenger need only prove "some link in the chain was an unusual or unexpected event external to the passenger." *Air France v. Saks, supra,* 470 U.S. at 406. The air carrier's awareness of dangerous flight conditions and lack of response to them, not the passenger's sensitivity to cabin conditions, are determinative in a causation analysis. *Olympic Airways v. Husain, supra,* 540 U.S. 644.

Here the carrier was unquestionably aware of the risk it was exposing its passengers to. Continental knew that the information it had was vital in prevention of DVT in passengers. Continental knew it should disseminate that information to its passengers, as its own trade association directed that DVt warnings be provided. Instead, Continental ignored this directive, and as a result the Petitioner suffered DVT.

The opinion of the Ninth Circuit creates a

conflict between this Court's holdings in Saks and Husain, the Ninth Circuit's own decision in Rodriguez, and the Fifth Circuit's holding in Blansett. The Ninth Circuit Panel attempted to carve out unprecedented distinctions between terms "omission" and "commission" while defining "accident." The Panel's reliance in its opinion upon the Fifth Circuit decision in *Blansett* and its opinion in *Rodriguez*, is improper in its conclusion of what constitutes an "inaction," holding that present case did not constitute an Article 17 "event." The Panel in the present case refers to an event that qualifies for Article 17 compensation as "*commission*", or an "inaction that produces an effect, result or consequence."

*Rodriguez* did not make a distinction between different types of inactions, only stating that had a standard to warn existed, then action on the part of the air carrier would have been required. In *Saks*, the airline did not fail to act in any way, as it had no knowledge or notice of a single passenger's internal reactions to flight conditions. This Court never addressed whether a distinction should have been made.

Even using the Ninth Circuit Panel's strange and previously unheard of distinctions of different definitions of "event," a "*commission*" by Continental Airlines occurred. In the present case, "*commission*" is not an individual crew member's failure to act on information in order to avoid causing injury to a passenger, but rather an airline-wide policy of not providing important, injury-preventing, safety information to its passengers, including those who may be unknown to them, more at risk from DVT. Continental's "*commission*" deprived Caman of the information he could have used to protect himself.

Continental had specific knowledge of the risks it exposed its passengers to. Based upon IATA's directives and recommendation of the Air Space Medical Association directors, Continental knew how to drastically decrease the DVT risk to its passengers. The risk would have been significantly decreased had Continental simply instituted a policy of warning its passengers. Instead, Continental's "*commission*" of failing to warn of DVT risk resulted in Petitioner's injury. It's failure to take steps to warn of that risk is no different, legally or philosophically, from a crew's refusal to reseat a sensitive passenger.

Continental Airlines does not dispute that it was aware of how its operations were leading to DVT-related injuries and deaths to a significant number of international travelers annually. The Panel's opinion analytically calls Continental's failure to warn as a mere "*omission*", or "inaction that idly allows an unfolding series of event to reach their natural conclusion." To call a failure to warn of a life-threatening condition a mere "*omission*" is not logical. A passenger does not board an international flight, expecting a natural outcome of the flight to be his development of DVT. Continental did not merely idly stand by. The airline created conditions on its flight that lead to development of DVT. To counterbalance the on-board cabin environment, all the airline had to do was to provide a warning to its passengers, a step practiced by many other airlines and prescribed by IATA. A conclusion of a mere "*omission*" should not result when uncontroverted facts urge and demand that positive steps be taken to remedy the danger of DVT.

The carrier knew that passengers were at risk for DVT, and they knew how to prevent DVT from occurring in this case, just as the crew knew of the risk

to the passenger in *Husain*. The failure to act on that information is unquestionably an important link in the causal chain that resulted in the Appellant developing a life-threatening medical condition. Excluding the circumstances here presented from the penumbra of Article 17 will be entirely inconsistent with the overall scheme of the Warsaw Convention.

The Panel failed to interpret the standard for an international air carrier requiring to take affirmative action, in *Husain*. Additionally, the Panel did not properly address the definition of "omission" or "inaction" as defined in *Husain*. The Panel did not include in its opinion analysis of an industry standard, required in *Rodriguez* to result in Article 17 liability. Finally, the Panel incorrectly relied on *Blansett*, giving Federal Aviation Regulations preemptive effect for setting international air travel standards.

The Panel also factually ignored in its opinion, the Air Space Medical Association's publication of its guidelines describing how carriers should address the risks airline passengers. Lastly, the Panel made no mention of the DVT risk warning standards promulgated to its members, including Continental, by IATA.

Rehearing is necessary to assure these important issues and facts are not overlooked. If rehearing on these issues is denied, Appellant respectfully urges rehearing be granted *en banc* so that these important issues be properly addressed.

## CONCLUSION

In order to protect the safety of international air travelers, to secure uniformity as to this important issue of international law and to resolve important

conflicts between the decision below and the decisions of other Circuits as well as this Court, plenary review is in order.

Respectfully submitted,

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No. 03-56810

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GUY CAMAN, an individual, Plaintiff-Appellant,

v.

CONTINENTAL AIRLINES, INC., Defendant - Appellee.

February 15, 2006, Argued and Submitted, Pasadena, California

August 2, 2006, Filed

COUNSEL: Clay Robbins III, Magaña, Cathcart & McCarthy, Los Angeles, California, for the appellant.

William J. Boyce, Houston, Texas, for the appellee.

JUDGES: Before: Betty B. Fletcher, Consuelo M. Callahan, Circuit Judges, and Morrison C. England, Jr., District Judge

## OPINION

ENGLAND, Circuit Judge:

This action is brought pursuant to Article 17 of the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, art. 17, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in note following 49 U.S.C. § 40105 ("Warsaw Convention" or "Convention"). The parties agree, and we concur, that this action is governed exclusively by the Warsaw Convention. The scope of our review is limited to whether appellant Guy Caman ("Caman") can establish liability against appellee Continental Airlines ("Continental") under the Convention. We hold that the district court properly granted summary judgment in favor of Continental on the ground that Continental's failure to warn Caman of the possibility of developing Deep Vein Thrombosis ("DVT") during the course of an international flight does not constitute an "accident" under the Warsaw Convention. Accordingly, we affirm.

## BACKGROUND

Caman alleges that he developed DVT while on board an international flight operated by Continental. Caman's axial argument is that Continental's failure to advise him of the risk of DVT, which can result from immobility, dehydration and being cramped in a small pitch seat over the course of an international flight, constitutes an "accident" for purposes of establishing liability under the Warsaw Convention.

The following facts are uncontested. On May 28, 2002, Caman departed from Los Angeles, California, on a flight bound for Paris, France. The flight was

uneventful with no equipment malfunction or other anomaly occurring. Caman did not receive any warning regarding the potential hazard of developing DVT on his international flight. During the course of his air travel, up to and including disembarkation from the aircraft, caman did not request any assistance or other accommodation form Continental personnel. Upon his arrival in France, Caman found it difficult to walk on his right leg and immediately sought medical attention. He was diagnosed with DVT and was admitted to a hospital where he remained for three days. He received therapy amounting to injections several times a week for the next month.

## STANDARD OF REVIEW

Caman appeals the district court's grant of summary judgment in favor of Continental. We review the district court's grant of summary judgment de novo. *Carey v. United Airlines*, 255 F.3d 1044, 1047 (9th Cir. 2001). Interpretations of treaties, such as the Warsaw Convention, are questions of law that are also reviewed de novo. *Hosaka v. United Airlines, Inc.*, 305 F.3d 989, 993 (9th Cir. 2002).

## ANALYSIS

Caman seeks review of the lower court's ruling that an air carrier's failure to warn passengers of the risk of developing DVT during international air travel is not an "accident" for purposes of Article 17 liability. Article 17 of the Warsaw Convention imposes liability on an air carrier for a passenger's death or bodily injury caused by an "accident" that occurred in connection with an international flight. *Olympic Airways v.*

*Husain*, 540 U.S. 644 (2004). The term "accident" in the Warsaw Convention has been defined as an "unexpected or unusual event or happening that is external to the passenger," and not "the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." *Air France v. Saks*, 470 U.S. 392, 405-06 (1985).

It is well settled that the development of DT as the result of international air travel, without more, does not constitute and "accident" for purposes of Article 17 liability. *See, e.g., Rodriguez v. Ansett Austl. Ltd.*, 383 F.3d 914, 919 (9th Cir. 2004); *Scherer v. Pan Am. World Airways, Inc.*, 54 A.D.2d 636, 387 N.Y.S.2d 580, 581 (App. Div. 1976). Generally, courts reach this conclusion because the development of DVT is nothing more than a passenger's own internal reaction to the usual, normal, and expected operation of the aircraft. *Rodriguez*, 383 F.3d at 917. Since the development of DVT itself does not constitute an Article 17 "accident." While this issue has been expressly decided by a sister circuit as well as by sister signatories to the Warsaw Convention, it is an issue of first impression in this circuit. Given the narrow ambit of the issue coupled with the unsettled state of the law, a brief recitation of both controlling precedent as well as related domestic cases follows.

I.

The seminal case on the issue of what constitutes an accident under Article 17 of the Warsaw Convention is *Air France v. Saks*, 470 U.S. 392. In *Saks*, an airline passenger became permanently deaf in one ear after experiencing severe pain and pressure in that ear during the plane's descent into Los Angeles en route

from Paris. The plaintiff sued the air carrier under Warsaw Convention, contending that her injury was the result of an "accident" occurring during her international flight. Justice O'Connor delivered the opinion of the Court and held that Article 17 liability arises only if a passenger's injury is caused by an "unexpected or unusual event or happening that is external to the passenger." *Id.* at 405. The conditions precedent to Article 17 liability are as follows: 1) an unexpected or unusual event; 2) external to the passenger; 3) that causes the plaintiff's injury. *See id.; see also Rodriguez*, 383 F.3d at 917.

Nearly two decades after *Saks* was decided, the Supreme Court revisited the question of what constitutes an Article 17 "accident." *Husain*, 540 U.S. 644. In *Husain*, a passenger severely allergic to tobacco smoke suffered a fatal asthma attack after the flight attendant repeatedly refused to assist him in finding a seat further away from the plane's smoking section. *Id.* at 653. With respect to whether the flight crew's refusal to reseat the decedent was "unusual or unexpected," the Court expressly declined to decide the question. *Id.* at 653. Instead, the Court adopted the district court's finding that the air crew's departure from relevant industry standard was unusual or unexpected conduct satisfying part of the first condition precedent. *Id.* at 652-53. Next, the Court considered whether inaction can constitute an "event" for purposes of Article 17 liability. The Court rejected Olympic Airways' argument that only affirmative conduct can constitute an "event" under Article 17. In dismissing that argument, the majority of the Court concluded that the air crew's failure to assist, or inaction, can constitute an Article 17 "event." *Id.* at 654-57. With respect to the element of causation, the Court

concluded that the failure of the air crew to reseat the decedent together with exposing him to smoke were each links in the causal chain leading to his expiration and entitling his wife, the plaintiff, to relief. *Id.* at 654.

In *Blansett v. Continental Airlines, Inc.*, 379 F.3d 177 (5th Cir. 2004), the plaintiff sought relief on the identical theory presented here. Namely, Blansett argued that the airline's failure to warn him of the potential for developing DVT is an Article 17 "accident" because the decision not to warn passengers of a known risk is a departure from industry standard and is, therefore, unexpected. *Id.* at 181. Based in part on *Husain*'s reasoning that inaction can constitute an event, the plaintiff urged that the air carrier's failure to warn also comprised an Article 17 "event." *Id.*

The *Blansett* court carefully abstained from creating a *per se* rule that any departure from an industry standard constitutes an Article 17 "accident." *Id.* at 182. Instead, the court pointed to the absence of any Federal Aviation Administration requirement that warnings of DVT be issued on international flights as evidence that a failure to warn of DVT is not "unexpected" and, therefore, outside the scope of Article 17. As the court explained in summation, "[i]t was not an unexpected or unusual decision for Continental merely to cleave to the exclusive list of warnings required of it be the agency that has regulatory jurisdiction over its flights." *Id.*

In *Rodriguez* this court addressed circumstances very similar to those presented here. Specifically, we considered first whether developing DVT can constitute an Article 17 "accident," and second, whether a failure to warn of the risk of DVT can constitute an Article 17 "accident." 383 F.3d 914. On the merits of the first claim, we concluded that "there was no event

external to the passenger, let alone an unusual or unexpected event." *Id.* at 918. As to the failure to warn claim, we declined to decide whether failure to warn of DVT can constitute an "accident." *Id.* at 919. Rather, we decided that Rodriguez had failed to create a genuine issue of material fact by failing to submit evidence establishing the industry custom or the airline's own policy, and failing to establish whether the airline complied with either the industry standard or its own company policy. *Id.*

The foregoing decisions have left unresolved certain issues salient to this court's inquiry. Specifically, whether an air carrier's departure from either industry standard or its own company policy are the appropriate benchmark for determining whether an event is "unexpected or unusual" conduct under Article 17 and, more importantly, whether the inaction alleged here is sufficient to constitute an Article 17 "event."

## II.

The starting point of our analysis is, of course, the text of the Convention and the context in which the written words are used. *Saks*, 470 U.S. at 396-97. The text of Article 17 is as follows:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Art. 17, 49 Stat. 3018. The foregoing language clearly establishes the liability of international air carriers for accidents resulting in harm to passengers sustained

during any operations of the aircraft. Conversely, Article 20(1) provides a defense for air carriers. The language of Article 20(1) is as follows:

> The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

Art. 20, 49 Stat. 3019.

With respect to considering these two Articles, the Supreme Court explained that "[t]he 'accident' requirement of Article 17 is distinct from the defenses in Article 20(1), both because it is located in a separate article and because it involves an inquiry into the nature of the event which *caused* the injury rather than the care taken by the airline to avert the injury." *Saks*, 470 U.S. at 407. The Court went on to clarify that, while these two inquiries may on occasion be similar, courts should decline to employ that similarity to repeal Article 20(1). *Id.* Attributing liability to an air carrier for failing to do all it can to prevent an injury that is inherent in air travel, as Caman is here requesting, improperly shifts the focus of the inquiry from the nature of the event which caused the injury to the alleged failure of the air carrier to avert the same. In addition, interpreting the term "accident" to include a failure to warn of a possible risk of flight would incorporate into Article 17 an inquiry that is properly left to analysis under Article 20(1) once it has been established that an accident occurred. *Husain*, 540 U.S. at 649 n.5 ("*After* a plaintiff has established a prime facie case of liability under Article 17 by showing that the injury was caused by an 'accident,' the air carrier

has the opportunity to prove under Article 20 that it took 'all necessary measures to avoid the damage or that is was impossible for [the airline] to take such measures.'" (quoting 49 Stat. 3019) (alteration in original) (emphasis added)).

Applying the treaty's text and Supreme Court precedent to the facts of this case, we hold that Caman cannot establish his DVT was the result of an "accident" because he cannot show that it resulted from an "unexpected or unusual event." *Saks*, 470 U.S. at 404, 406. Specifically, we hold that Continental's failure to warn Caman of DVT is not an "event" as that term is discussed in *Saks* and *Husain*. Rather, Continental's failure to warn was an act of *omission* (inaction that idly allows an unfolding series of event to reach their natural conclusion) as opposed to an act of *commission* (inaction that produces an effect, result or consequence) as in *Husain's* rejection of a direct plea for help.

For the foregoing reasons, we conclude that Continental's failure to warn Caman of the risk of developing DVT is not an Article 17 "accident." Accordingly, he cannot obtain relief under the Warsaw Convention.

**AFFIRMED.**

Case No. CV 02-8958-JFW (Shx)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

GUY CAMAN -v- CONTINENTAL AIRLINES, INC.

September 5, 2003, Decided

September 8, 2003, Entered

COUNSEL: For Guy Caman, Plaintiff: Clay Robbins III, Magaña Cathcart & McCarthy, Los Angeles, California

For Continental Airlines, Inc., Defendant: Jeffrey A. Worthe, John R. Hanson, Fertuzzo & Worthe, Newport Beach, California

JUDGE: PRESENT: HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

OPINION BY: JOHN F. WALTER

OPINION: CIVIL MINUTES - - GENERAL

PROCEEDINGS (IN CHAMBERS): ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On July 28, 2003, Defendant Continental Airlines, Inc. ("Continental") filed a Motion For Summary Judgment. On August 4, 2003, Plaintiff Guy Caman filed his opposition. On August 18, 2003, Continental filed a Reply. The Court found the matter appropriate

for submission without oral argument. *See* Local Rule 7-15 (the Court may dispense with oral argument on any matter unless otherwise required); Fed.R.Civ.P. 78. The matter was, therefore, removed from the Court's August 25, 2003 hearing calendar and the parties were given advance telephonic notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

I. Facts and Procedural Background

Pursuant to the Court's recommendation, Plaintiff and Continental stipulated to certain facts for purposes of Continental's summery judgment motion. *See* Stipulation Re Facts On Which Summary Judgment Is To Be Determined ("Stipulated Facts") attached as Exh. A to Statement Of Uncontroverted Facts And Conclusions Of Law lodged by Continental on July 28, 2003. The stipulation specifically provides that "[n]either the moving nor the opposing party shall present additional facts to the Court for purposes of the Motion for Summary Judgment, unless both parties have agreed in writing to modify this stipulation." (*Id.*)

According to the stipulated facts, Plaintiff traveled on an international flight operated by Continental. (Stipulated Fact ¶ 1.) The Continental flight was uneventful and the aircraft operated normally. (*Id.* at ¶ 2.) Plaintiff claims that, without any external or physical trauma to his person, he developed deep vein thrombosis ("DVT") while traveling on the Continental flight. (*Id.* at ¶¶ 3 & 5.) Plaintiff did not request aid or inform any employee of Continental that he had symptoms or needed medical attention during the flight. (*Id.* at ¶6.)

II. Standard

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c) The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 256 (1986). A party opposing a properly made and supported motion for summary judgment may not rest upon mere denials but "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). In particular, when the non-moving party bears the burden of proving an element essential to its case, that party must make a showing sufficient to establish a genuine issue of material fact with respect to the existence of that element or be subject to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

An issue is genuine if evidence is produced that would allow a reasonable jury to reach a verdict in favor of the non-moving party. *Anderson*, 477 U.S. at 248. The Court must assume the truth of direct evidence set forth by the opposing party. *See Hanon v. Dataproducts Corp.* 976 F.2d 497, 507 (9th Cir. 1992). However, where circumstantial evidence is presented, the Court may consider the plausibility and reasonableness of inferences arising therefrom. *See Anderson*, 477 U.S. at 249-50; *TW Electrical Service, Inc. v. Pacific Electrical Contractors Ass'n*, 809 F.2d 626, 631-32 (9th Cir. 1987). In that regard, "a mere 'scintilla' of evidence will not be sufficient to defeat a properly supported motion for summary judgment;

rather, the nonmoving party must introduce some significant probative evidence tending to support the complaint." *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997) (internal quotations omitted).

In ruling on a summary judgment motion, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson* 477 U.S. at 249. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from facts are jury functions..." *Id.* at 255.

III. Discussion

Plaintiff argues Continental should have warned him about the risks of developing DVT and that their failure to warn constituted an accident for purposes of Article 17 of the Warsaw Convention. 49 Stat. 3000 (1934); T.S. 876 *reprinted in* 49 U.S.C. §40105. Article 17 of the Warsaw Convention provides:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Accordingly, in order to prevail on his complaint against Continental, Plaintiff must prove that an "accident" was the cause of his injury. *Air France v. Saks*, 470 U.S. 392, 396 (1985). The United States Supreme Court defined "accident" as "an unexpected or unusual event or happening that is external to the passenger." *Id.* at 405. In addition, the Court stated

"when the injury results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply." *Id.* at 406.

In this case, there is no evidence that Plaintiff developed deep vein thrombosis from an unexpected or unusual event or happening that was external to Plaintiff. *See, e.g., Margrave v. British Airways*, 643 F.Supp. 510, 512 (S.D.N.Y. 1986) (holding that "extended sitting in an airplane, even in an uncomfortable position, cannot properly be characterized as the sort of 'accident' that triggers an airline's liability under the Warsaw Convention"); *Scherer v. Pan American World Airways, Inc.*, 387 N.Y.S.2d 580, 581 (1976) (finding "no 'accident' as a matter of law" where the plaintiff alleged "bodily injury (namely, thrombophelitis), resulting from merely 'sitting' aboard a Pan Am flight from Tokyo to California"). As a result, Plaintiff has failed to demonstrate that an "accident" was the cause of his injury as that term is used in the Warsaw Convention and defined by the Supreme Court in *Saks*.

IV. Conclusion

For the foregoing reasons, the Court GRANTS Defendants' Motion For Summary Judgment.

IT IS SO ORDERED

The Clerk shall serve a copy of this Minute Order on all parties to this action.

No. 03-56810

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GUY CAMAN, an individual,
Plaintiff-Appellant,

v.

CONTINENTAL AIRLINES, INC.,
Defendant - Appellee.

SEP 14 2006

D.C. No. CV-02-08958-JFW Central District of California, Los Angeles

ORDER

Before: B. FLETCHER and CALLAHAN, Circuit Judges, and ENGLAND, District Judge*

The panel has voted to deny the petition for panel rehearing. Judge Callahan has voted to deny the suggestion for rehearing en banc, and Judges B. Fletcher and England so recommend.

The full court was advised of the suggestion for rehearing en banc. No judge requested a vote on whether to rehear the matter en banc. The petition for panel rehearing and suggestion for rehearing en bane are DENIED.

*The Honorable Morrison C. England, Jr., United States District Judge for the Eastern District of California, sitting by designation.